No. 46729-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TODD EDWARD FEARS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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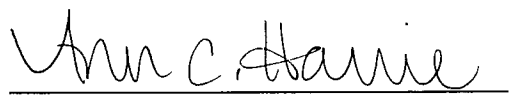
Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: 
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B. Did the Trial Court error when it refused to allow testimony from Fears's expert on the negative compounding affects of single photo to substantiate an eye-witness identification of a suspect?

C. Did the trial court abuse its discretion when it imposed discretionary legal financial obligations on Fears without considering Fears's individualized present or future ability to pay them?

II. STATEMENT OF THE CASE

On May 3, 2014, between 9:00 and 10:00 a.m., Laura Cohen took her dog for a walk in the neighborhood by her house at 202 Schmit Road, Toledo, Washington. 1RP 31-33.[1] Ms. Cohen's property is approximately 12-acres in size, fenced with a five-foot non-climbable fence, and a house on the hill. 1RP 31. When Cohen left her house that morning she walked down the driveway, out the gate into the road and then walked up the road onto Schmit Road. 1RP 33, 55. Cohen's walk typically takes about 35 minutes from start to finish. 1RP 33. As Cohen started her walk that morning she observed a white car stop and then go down the street. 1RP 34. As

[1] There are two volumes of verbatim report of proceeding for the trial. The first volume dated August 20, 2014, the State will cite as 1RP. The second volume dated August 21, 2014, the state will cite as 2RP.

the vehicle passed her on her left she waved at the driver and passenger. 1RP 34. Cohen was able to see clearly into the vehicle, as the windows to the vehicle were down, the passenger was leaning back in his seat, and the vehicle was driving by slowly. 1RP 34-35.

About 5 to 10 minutes later the same vehicle drove past Cohen again, this time the driver was on her side. 1RP 35. Cohen waved at the vehicle again but did not get much of a response. 1RP 35. Cohen continued on her walk another 20 to 25 minutes and then headed home. 1RP 36. As Cohen approached her home she noticed a little, white sports car in her driveway and observed two guys running down her driveway and headed towards the gate. 1RP 36, 66. Cohen yelled out at the men "hey, what are you doing?" 1RP 36. One of the men, later identified as Todd Edward Fears, waved at Cohen with a piece of paper in his hand. 1RP 36. Cohen's house was for sale at the time and there was a flyer box; so she assumed it was a flyer at the time. 1RP 36. Fears waved the piece of paper over his head and told Cohen "I'm looking at the house, and there's a big pit bull in the yard and it just bit me." 1RP 37. Cohen does not have a pit bull and this comment was concerning and confusing since she has two smaller dogs. 1RP 37. Also confusing was that Fears did not stop to talk to Cohen after making the statement. 1RP 37.

Cohen watched as the two men got into the white car. 1RP 38. One of the men was wearing a checked shirt and the other was tall and skinny with dark clothing, a baseball cap and a backpack. 1RP 38.

The men began to leave, but with the way that the driveway is constructed they had to back up towards Cohen to drive down the road. 1RP 38. Cohen began yelling at them "I'm going to call the sheriff" and also yelled out the license plate number of the car at him. 1RP 38. Cohen had her cellphone on her and called the sheriff's office and talked to dispatch. 1RP 38. Cohen told the dispatcher the license plate on the vehicle "AOY0395." 1RP 38. While Cohen was on the phone with dispatch she went up to the house and discovered she had been robbed. 1RP 39. The closet door to the home office was open and the fire safe was gone, as was all of her jewelry from her jewelry dresser. 1RP 39-40 and 43-44. Cohen testified that the total aggregate value of the items totaled approximately $14,000. 2RP 45.

Deputy Matt Schlecht of the Lewis County Sheriff's Office responded to the scene and interviewed Cohen about the burglary and missing items. 1RP 57. While Deputy Schlecht was interviewing Cohen, dispatch was attempting to locate the suspect vehicle based

on the license plate number. 1RP 106. A vehicle was located that matched the description of the vehicle. 1RP 106.

Officer Ken Hochhalter of the Kelso Police Department was on duty and received the call from Lewis County Sheriff's Department regarding the white Mitsubishi, with license plate AOY0695. 1RP 98. The vehicle was registered to Tammy Nevills, Fear's girlfriend, who lived in Kelso. 1RP 90.

After the call from Lewis County, Officer Hochhalter received a call from Nevills, alleging that her vehicle had been stolen. 1RP 88-89 and 98. The "stolen" vehicle was the same one that matched the description and plate number from the burglary scene. 1RP 106. However, when Officer Hochhalter investigated the matter, her story did not add up. 1RP 99-100. When Officer Hochalter approached Nevills about the discrepancies she changed her story and provided a written statement. 1RP 101. In her statement, she reported she was specifically called by Fears to report the vehicle as stolen. 1RP 101-102. Nevills also reported that Fears was driving the vehicle on that date. 1RP 106.

Officer Hochhalter relayed the information regarding Fears to Lewis County dispatch. 1RP 107. Deputy Schlecht was still interviewing Ms. Cohen when he received the call from dispatch and

was advised that Fears had been driving the white Mitsubishi earlier that day. 1RP 106. Deputy Schlecht asked Cohen to provide him with a description of the suspect she saw at her house. 1RP 107. Deputy Schlecht pulled up a Department of Licensing photograph of Fears on his computer. 1RP 107. When Cohen was asked if she would recognize the burglar if she was shown a photograph she said yes. 1RP 46. She was shown a photograph of Todd Fears and told Deputy Schlecht "that's the guy." 1RP 46. Cohen said Fears had the same facial structure and looked the same other than looking heavier in the face than in the photograph. 1RP 109. Cohen did not have any doubt that Fears was the same guy Cohen saw leaving her house on the day of the burglary, the same guy that drove by her on her walk, and the same person sitting before her in the courtroom during the jury trial. 1RP 46-47.

Deputy Schlecht relayed the information to Deputy Jeremy Almond of the Lewis County Sheriff's Office and proceeded with his investigation. 1RP 108. Officer Almond received the call about a possible interrupted burglary at 202 Schmit Road in Toledo. 1RP 71-72. When Deputy Almond received the call he realized that he was travelling in the direction of Schmit Road. 1RP 72. Deputy Almond knew from the dispatch call that the suspect's vehicle was a white

passenger car. 1RP 72. As Deputy Almond travelled northbound on Jackson South he hit a straightaway and saw a white car travelling southbound at a very high rate of speed. 1RP 72. The vehicle passed him going the opposite way as he was pulling over to the right of the roadway. 1RP 72. Deputy Almond turned on his overhead lights, turned his vehicle around and initiated a pursuit of the vehicle. 1RP 73. The vehicle continued to evade Deputy Almond despite the fact that his lights and siren were on and visible to the vehicle. 1RP 74.

As Deputy Almond was chasing the vehicle he made the corner near Walker Road. 1RP 76. At this point a safe was thrown out of the suspect vehicle in front of him and shattered in front of him. 1RP 76. Deputy Almond had to maneuver his vehicle so as not to hit the safe. 1RP 76. As Deputy Almond was dodging the safe he noticed paperwork in the air. 1RP 76-77. Deputy Almond did not stop his vehicle to recover the safe since he was still in pursuit of the suspect's vehicle, and when he went back later to investigate, the safe was gone. 1RP 83.

Two women observed the high speed pursuit of Fear's vehicle. 2RP 16. The two women were Marlena Avelar and Iraida Contreras. 2RP 16. Both Avelar and Contreras saw a car probably four miles, just right off the exit going "really, really fast." 2RP 17. The

vehicle appeared to them to be a white Mitsubishi car. 2RP 16-18. Following the car in pursuit was a police car. 2RP 20. Both Fears and the officer were travelling in the opposite direction as Avelar and Contrerars. 2RP 20. As the two women were travelling in a vehicle down Jackson Highway they observed a safe to the right of the roadway and a bunch of papers flying everywhere. 2RP 16. Avelar and Contreras pulled over to pick up the papers and hand them to the police. 2RP 18. While the women were pulled over, Lyle Barker, who was travelling south down Jackson Highway came around a corner just past Calvin Road when he saw what appeared to be a gray toolbox laying off on the northbound side of the road. 2RP 11-12. Barker also saw two women pulled into the drive just down from where he had picked up the box. 2RP 14. The box was just off the road, laying on the shoulder. 2RP 11-12. Avelar and Contreras observed Barker pick up the safe at the same time they were going to retrieve it. 2RP 18. Barker picked up the box and put it in the back of his car and went to a dentist appointment. 2RP 12.

Later, Barker went out to look at the box he picked up and remembered reading the daily news and reading an article about the high-speed chase associated with the robbery. 2RP 12. Barker remembered that several items were taken, including a box. 2RP 12.

The latch on the box was broken and there was nothing inside of it. 2RP 14. Barker turned the box into the Sheriff's Office. Later, Ms. Cohen identified the safe as the one that was stolen from her house. 2RP 87. Some of the paperwork previously inside the fire safe included paperwork for Cohen's engagement ring and her high school diploma. 2RP 50.

Meanwhile, Fear's vehicle continued southbound on Jackson Street and made its way towards Interstate 5. 2RP 74-75. Despite Deputy Almond's repeated attempts to pull the vehicle over, the vehicle began passing other vehicles in the shoulder and driving in a dangerous manner. 2RP 75, 78. At some point Deputy Almond lost sight of the vehicle when he was travelling southbound on the interstate. 2RP 76. Deputy Almond terminated the pursuit of the vehicle because it was too dangerous due to traffic and the amount of civilians around. 2RP 78. Deputy Almond had already requested backup from other agencies, including State Patrol, Cowlitz County Sheriff's Office and Castle Rock Police Department. 2RP 75-76.

On May 6, 2014, Cohen was contacted by Deputy Tyson Brown to look at a photo montage. 1RP 47 and 2RP 28. The montage contained photographs of six different males. 2RP 28. Deputy Brown asked Cohen if she would be willing to look at the pictures and to

pick out the person she thought had robbed her. 2RP 47. Deputy Brown also told Cohen that the person she saw on her property several days prior may or may not be featured in the montage. 2RP 28-29. Cohen said she would like to participate and when she was shown the montage she immediately picked out the photograph of Fears. 1RP 47 and 2RP 29. At trial, Deputy Brown testified as to the protocol he followed for the montage, both before and after showing it to Cohen. 2RP 28-31.

At trial Defendant's counsel requested that an expert witness, Dr. Stephen Ross, be allowed to testify as to the procedures of witness identification, and that the testimony would be in general terms. 2RP 53-54 and 57-58. The expert was brought in to make an offer of proof through his testimony. 2RP 66. The trial court asked how Dr. Ross could make that conclusion if the expert had not interviewed or talked to the eyewitness and how could he state an opinion as the reliability of the eyewitness identification. 2RP 57. Defense counsel argued that there was scientific basis as to why the montage identification needs to be looked at with a critical eye because of other influences set out in section 5 of the expert's research. 2RP 58. State's counsel argued that the expert could not actually offer a scientific opinion unless he actually examined the

witness, which had not been done. 2RP 58-59. The protocol that the expert was relying on had not yet been accepted by the scientific community, law enforcement or anyone for that matter. 2RP 60, 62. Because the protocols that the expert wanted to talk about had not been adopted by the scientific community and were still in peer review, the Court explained that it did not meet the *Frye* test.[2] 2RP 62. The Court explained that the expert would not be helpful to the jury without directly contradicting and commenting on the veracity of the witness, and the law is clear that this is not allowed. 2RP 65.

Ultimately, the trial court did not allow Dr. Ross to testify because there was a substantial amount of circumstantial evidence along with eyewitness identification. 2RP 84. Coupled together, the Court questioned whether this kind of testimony would be helpful to the jury. 2RP 84. Additionally, the Court had concerns that it would be improper for Dr. Ross to take the stand and testify as to whether another witness was truthful or their testimony was accurate. 2RP 89. Finally, the Court determined that these were all issues that Defendant's counsel could argue at closing, but that it was improper for Dr. Ross to testify, especially when the protocols had not been adopted to support his testimony. 2RP 89-91.

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[2] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)

Todd Fears was originally charged with Residential Burglary,[3] Theft in the Second Degree[4] and Attempt to Elude a Pursuing Police Vehicle.[5] CP 1-2. At trial, the State moved to orally amend the charge of Theft in the Second Degree to Theft in the Third Degree.[6] The jury found Fears guilty of Residential Burglary, Theft in the 3rd Degree and Attempt to Elude a Pursuing Police Vehicle. 2RP 134.

III. ARGUMENT

A. FEAR'S CANNOT CLAIM THAT HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS RIGHT TO DEFENSE WERE VIOLATED BECAUSE THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY BY DR. STEPHEN ROSS.

Fears argues his Fourteenth Amendment right to due process and his constitutional right to present a defense were violated when the trial court excluded the testimony of Stephen Ross. Brief of Appellant 9. Fears argues his convictions must be reversed and remanded for a few trial, with instructions to permit Dr. Ross to testify on his behalf. Brief of Appellant 16. The error is not constitutional and the trial court properly excluded the testimony of Dr. Ross. The conviction should not be remanded or reversed.

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[3] RCW 9A.52.025
[4] RCW 9A.56.040
[5] RCW 46.61.024
[6] RCW 9A.56.050. Ms. Cohen was unable to provide a fair market value of her stolen jewelry. The State did not pursue the Theft 1st or 2nd because the total value of the amount stolen was in dispute. 2RP 45.

1. Standard Of Review.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted).[7]

2. Invoking The Compulsory Process Clause And The Right Of Confrontation Guaranteed By Sixth Amendment Does Not Guarantee A Criminal Defendant's Proposed Testimony Is Admissible.

The Fourteenth Amendment to the United States Constitution guarantees that the State will not deprive a person of their liberty without due process of law. The Fourteenth Amendment guarantees that a person accused of a crime has the right to a fair trial. *State v. Statler*, 160 Wn. App. 622, 637, 248 P.3d 165 (2011), *review denied,* 172 Wn.2d 1002 (2011), *citing State v. Davis,* 141 Wn.2d 798, 824–25, 10 P.3d 977 (2000). "[T]he right to due process provides heightened protection against government interference with certain fundamental rights." *Id.* (citations and internal quotations omitted). To

[7] Simply alleging a constitutional rights violation does not make an evidentiary ruling reviewed under a de novo standard instead of an abuse of discretion standard. *See In re Pers. Restraint of Morris,* 176 Wn.2d 157, 168, 288 P.3d 1140 (2012); *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). The State acknowledges that in *State v. Turnispeed*, 162 Wn. App. 60, 255 P.3d 843 (2011) Division 3 held that although evidentiary determinations of a trial court are reviewed under an abuse of discretion standard, when an appellant alleges a confrontation clause violation in regards to an evidentiary ruling the proper review is de novo. *Turnispeed* is incorrectly decided and contrary to the precedent.

satisfy the right to a fair trial the trial court is not required to ensure the defendant has a perfect trial. *Id.*, *citing In re Elmore,* 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

The due process right, in its essence, is the right for a criminal defendant to have a fair opportunity to defend him or herself against the State's accusations. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *citing Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) (quotations omitted). A defendant is guaranteed the right to confront and cross-examine witnesses who testify against him or her and the right to compel a witness to testify. U.S. Const. amend. VI. "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *Jones*, 168 Wn.2d at 720. Unlike other rights guaranteed under the Sixth Amendment, the Compulsory Process Clause requires an affirmative act by a defendant and is not automatically set into play by the initiation of an adversarial process. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). "The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct. *Taylor v. Illinois*, 484 U.S. at 410.

A defendant does not have an absolute right to present evidence. *Jones*, 168 Wn.2d at 720. Without adherence to the rules of evidence and other procedural limitations the adversary process would not function effectively because it is imperative that each party be given a fair opportunity, within the rules, "to assemble and submit evidence to contradict or explain the opponent's case." *Taylor v. Illinois*, 484 U.S. at 410-11.

Evidence presented by a defendant must be at the very least minimally relevant and there is no constitutional right for a defendant to present irrelevant evidence. *Jones*, 168 Wn.2d at 720. If a defendant can show that the evidence is relevant than the burden shifts to the State to show the trial court that the evidence is so prejudicial that it will "disrupt the fairness of the fact-finding process at trial." *Id.* Invoking the right to compulsory process is not a free pass to present evidence that would be considered inadmissible under the Rules of Evidence. *Taylor v. Illinois*, 484 U.S. 414.

3. The Trial Court Did Not Abuse Its Discretion When It Ruled Dr. Ross Could Not Testify As An Expert In Regards To Memory Or Eye Witness Identification.

It is within the sound discretion of the trial court to determine the admissibility of proposed expert testimony. *In re Morris*, 176 Wn.2d 157, 168, 288 P.3d 1140 (2012). The evidence rules state:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702.

For expert testimony to be admissible under ER 702, (1) the witness must qualify as an expert, "(2) the expert's theory must be based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact." *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984) (citation omitted); ER 702. When the jurors, without special training or expertise, are as competent as an expert to evaluate the evidence presented, the expert's opinion is not helpful and using an expert in these situations can cause the jury to place too heavy of a reliance on the expert's testimony because of the "aura expertise." 5D K. Tegland, Wash. Prac., Evidence § 702.6, at 312-13 (2013). However, expert testimony on an issue that is counterintuitive and difficult for the average juror to understand may be admitted on the ground that it is helpful to the trier of fact. *State v. Ciskie*, 110 Wn.2d 263, 273-74, 751 P.2d 1165 (1988).

The Washington Supreme Court has tackled the issue of expert testimony regarding eye witness identification. "[W]here

eyewitness identification is a key element of the State's case, the trial court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony. *State v. Cheatam*, 150 Wn.2d 626, 649, 814 P.3d 830 (2003). The trial court should consider the expert's proposed testimony, including the specific subjects involved in the eyewitness identification to which the testimony relates, such as whether the defendant displayed a weapon, the effect of stress on the identification, whether the victim and the defendant are of the same race, and other factors. *Cheatam*, 150 Wn.2d at 649. This approach corresponds with admissibility of expert testimony and the rules for admissibility of relevant evidence in general. *Id.;* ER 402; ER 702.

a. Fears's trial counsel did not establish the foundational requirements for admission of an expert opinion by a preponderance of the evidence.

The proponent of evidence must establish its relevance, materiality and the elements of a required foundation, by a preponderance of the evidence. *State v. Nava*, 177 Wn. App. 272, 290, 311 P.3d 83 (2013) (citations omitted); *State v. Hilton*, 164 Wn. App. 81, 99, 261 P.3d 683 (2011). The critical inquiry here is did Fears's trial counsel establish by a preponderance that Dr. Ross and

his proposed testimony meet the requirements of ER 702? The short answer is no.

The trial court allowed Dr. Ross to make an offer of proof through his testimony. 2RP 66. The proposed testimony by Dr. Ross was clear; Dr. Ross was not a qualified expert.

The information provided was woefully inadequate for the trial judge to make an informed decision regarding, 1) whether Dr. Ross was qualified to give an expert opinion regarding eyewitness testimony and memory perception, 2) whether the subject matter and scientific theory the defense was proposing Dr. Ross testify about was generally accepted in scientific community, 3) how the information was beyond the common sense of the jurors given the particular facts and circumstances of Fears's trial, 4) how the information would be helpful to the jury and 5) how Dr. Ross's proposed testimony would not be considered an improper comment on the veracity of another witness. 2RP 89-91.

The State's objection to Dr. Ross's proposed testimony was that it would not be relevant and that the procedures he wanted to testify to had only been proposed and had not been accepted in the scientific community. 2RP 79-81 and 87-91. In fact, the research that Dr. Ross was going to use to testify to was merely in the peer review

phase. 2RP 81. Dr. Ross had also never personally administered photo montages himself. 2RP 81-82. And finally, Dr. Ross had never even met with the witness, Laura Cohen, and could not personally testify to her veracity as a witness. 2RP 89.

Because the protocols that the expert wanted to talk about had not been adopted by anyone, the Court explained that it did not meet the *Frye* test. 2RP 62. The Court explained that the expert would not be helpful to the jury without directly contradicting and commenting on the veracity of the witness, and the law is clear that this is not allowed. 2RP 65. Finally, the Court determined it was improper for Dr. Ross to testify, especially when the protocols had not been adopted to support his testimony. 2RP 89-91.

b. The trial court's exclusion of Dr. Ross was not an abuse of discretion.

The trial court's determination that an expert witness will not be allowed to testify is reviewed under an abuse of discretion standard. *Finch*, 137 Wn.2d at 810. "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling

was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted).

For the reasons argued above, the trial court did not abuse its discretion when it excluded Dr. Ross's testimony. It was not manifestly unreasonable, given the limited information Fears's trial counsel provided to the trial court in his offer of proof, for the trial court to exclude the testimony. It was not untenable for the trial court to hold that Dr. Ross has not been proven to be an expert in the field of his proposed testimony because he admitted that the area of his "expertise" was still in the peer review process and had not yet been approved. 2RP 83-84. Finally, the trial court's conclusion that the proposed testimony would not be helpful to the trier of fact was not manifestly unreasonable or based upon untenable grounds. 2RP 84.

B. FEARS CANNOT RAISE ISSUE WITH THE TRIAL COURT'S IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS BECAUSE HE DID NOT RAISE IT IN THE TRIAL COURT AND THE ISSUE IS NOT RIPE.

Fears argues, for the first time on appeal, that the trial court impermissibly imposed legal financial obligations such as witness costs, court-appointed attorney fee, and defense experts and other defense costs incidentals fee because it failed to make an

individualized inquiry into Fears's current and future ability to pay them. Brief of Appellant 22. The alleged error is not a manifest constitutional error and therefore, Fears cannot raise this issue for the first time on appeal. Despite Fear's assertion, the issue is also not ripe for review. Brief of Appellant at 23.

1. Standard Of Review

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 171 Wn. App. 379, 387, 294 P.3d 708 (2012).

2. Fears Did Not Object To The Imposition Of Witness Costs, Attorney Fees, Expert Fees or Other Defense Costs Incidentals Fee and Cannot Raise The Issue For The First Time On Appeal Because The Alleged Error Is Not A Manifest Constitutional Error.

The Washington State Supreme Court determined that the imposition of legal financial obligations alone is not enough to implicate constitutional concerns. *State v. Curry*, 118 Wn.2d 911, 917 n.3, 829 P.2d 166 (1992). "[F]ailure to object when the trial court imposed court costs under RCW 10.01.160 amounted to a waiver of the statutory (not constitutional) right to have formal findings entered as to [a defendant's] financial circumstances." *State v. Phillips*, 65 Wn. App. 239, 244, 828 P.2d (1992) (citations omitted). A defendant's failure to object at his sentencing hearing to the court's finding that the defendant has the current or likely future ability to pay

legal financial obligations can preclude appellate review of the sufficiency of the evidence that supports the finding. *State v. Blazina*, 171 Wn. App. 906, 911, 301 P.3d 492 (2013).

There was no objection to the imposition of legal financial obligations at the sentencing hearing. RP Sentencing at 10-11. A timely objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court); *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814, 822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal). Fears's lengthy sentence alone is not enough to support the argument that he had the present inability to pay the jail fee.

The alleged error is not of constitutional magnitude. Even, if this Court finds the error alleged by Fears is an error of constitutional magnitude, the error is not manifest because there is not a sufficient

record for this Court to review the merits of the alleged error. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

3. The Imposition Of Legal Financial Obligations Is Not Ripe For Review.

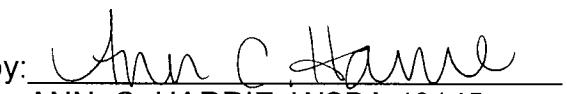
The determination that the defendant either has or will have the ability to pay during initial imposition of court costs at sentencing is clearly somewhat "speculative," the time to examine a defendant's ability to pay is when the government seeks to collect the obligation. *State v. Crook* 146 Wn. App. 24, 27, 189 P.3d 811, *review denied* 165 Wn.2d 1044, 205 P.3d 133 (2008); *State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009). This Court has previously held that the issue is not ripe until the State seeks to collect payment or enforce the judgment. *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). Therefore, because there is no evidence in the record that the State has sought to collect or enforce the legal financial obligations portion of Fears's sentence, the issue is not ripe for review.

IV. CONCLUSION

Fears's conviction should not be reversed and remanded. The Trial Court was correct to exclude the testimony of Dr. Ross, and doing so did not violate Fears's Due Process Rights. Additionally, the issue of whether Fears has the individualized ability to pay the legal financial obligations LFOs is not yet ripe for review, yet alone appeal. Thus, a hearing is not required to address his ability to pay them.

RESPECTFULLY submitted this 31st day of August, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by: 
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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. TODD EDWARD FEARS, Appellant.	No. 46729-1-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Ann C. Harrie, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On August 31, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lisa Tabbut, attorney for appellant, at the following email address: Ltabbutlaw@gmail.com.

DATED this 31st day of August, 2015, at Chehalis, Washington.

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

August 31, 2015 - 1:24 PM

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